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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 ROBERT C. HICKS,

12 Plaintiff,

13 v.

14 STATE OF CALIFORNIA DEPT. OF INS.  
15 INVESTIGATIONS, et al.,

16 Defendants.  
17

) Case No. CV 08-2714-CJC (JTL)

) MEMORANDUM AND ORDER  
) DISMISSING FIRST AMENDED  
) COMPLAINT WITH LEAVE TO AMEND

18 On November 14, 2008, Robert C. Hicks ("plaintiff"), proceeding pro se and in forma  
19 pauperis, filed a "First Amended Opening Complaint" pursuant to 42 U.S.C. Section 1983 ("First  
20 Amended Complaint"). Plaintiff's claims arise from his November 23, 2005 arrest and  
21 subsequent unsuccessful prosecution for multiply felony counts, including kidnaping. Plaintiff  
22 names the following defendants in his First Amended Complaint: Los Angeles County  
23 Metropolitan Transit Authority ("MTA"); Sheila Cowan ("Cowan"); Roy Romero ("Romero"); the  
24 State of California Department of Insurance ("Department of Insurance"); Larry Pagenkopp  
25 ("Pagenkopp"); Robert Sierra ("Sierra"); Silvia Aubrey ("Aubrey"); the Los Angeles County  
26 District Attorney's Office ("District Attorney's Office"); Ephriam Turner ("Turner"); and Theodore  
27 Loewen ("Loewen").  
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1 The Court has screened the First Amended Complaint before ordering service to  
2 determine whether the action (1) is frivolous or malicious; (2) fails to state a claim on which  
3 relief may be granted; or (3) seeks monetary relief against a defendant who is immune from  
4 such relief. See 28 U.S.C. § 1915(e)(2)(B).

5 The Court's screening of plaintiff's First Amended Complaint under the foregoing statute  
6 is governed by the following standards: A complaint may be dismissed as a matter of law for  
7 failure to state a claim for two reasons: (1) the plaintiff fails to state a cognizable legal theory;  
8 or (2) the plaintiff has alleged insufficient facts under a cognizable legal theory. Balistreri v.  
9 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Because plaintiff is appearing pro se,  
10 the Court must construe the allegations of the First Amended Complaint liberally and must  
11 afford plaintiff the benefit of any doubt. See Karim-Panahi v. Los Angeles Police Dep't, 839  
12 F.2d 621, 623 (9th Cir. 1988). Moreover, in determining whether a complaint states a claim on  
13 which relief may be granted, allegations of material fact are taken as true and construed in the  
14 light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989).  
15 A pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear  
16 that the deficiencies of the complaint cannot be cured by amendment. Noll v. Carlson, 809 F.2d  
17 1446, 1448 (9th Cir. 1987).

18 After careful review and consideration of the First Amended Complaint under the  
19 relevant standards, and for the reasons discussed below, the Court finds that plaintiff has failed  
20 to state a claim upon which relief may be granted and **ORDERS the FIRST AMENDED**  
21 **COMPLAINT DISMISSED WITH LEAVE TO AMEND.**

### 22 23 **ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

24 On November 23, 2005, plaintiff was arrested and charged with multiple felony counts,  
25 including kidnaping. The case against plaintiff was based on a physical altercation that  
26 occurred on November 7, 2002, while plaintiff, who, at the time was employed by the MTA as  
27 a bus driver, was driving an MTA bus and was attacked by Umeka Joyce Frazier, a female  
28 passenger. (First Amended Complaint at 7). Plaintiff sustained injuries from the attack.

1 Treatment for the injuries was, initially, paid by the MTA's workers compensation benefits  
2 program. (First Amended Complaint at 7). Plaintiff was later denied treatment and damages  
3 after defendant Cowan, a Senior Claims Examiner, determined that video footage of the  
4 November 7, 2002 altercation evinced plaintiff acted improperly and was, therefore, not entitled  
5 to benefits. (Id.). Thereafter, plaintiff received a favorable judgement from the Workers  
6 Compensation Appeals Board and the Los Angeles Superior Court establishing that plaintiff was  
7 not the initial aggressor in the November 7, 2002 altercation with Ms. Frazier. (Id. at 7-8).

8 Sometime thereafter, plaintiff alleges that defendants conspired to have plaintiff  
9 incarcerated to prevent him from prevailing in a related unlawful termination case against  
10 defendant MTA. (Id. at 8). Plaintiff alleges that defendants pursued a lawsuit against him  
11 without probable case, and did so in retaliation for plaintiff's inadvertent exposure of the MTA's  
12 illegal employment practices with regard to sick leave and overtime pay. (Id. at 8-9). As a  
13 result of this conspiracy, plaintiff was arrested on November 23, 2005. All charges against  
14 plaintiff were dismissed on April 24, 2007.

15 In addition to the claim for conspiracy, plaintiff brings a claim for abuse of process  
16 against all defendants alleging that they knew the criminal charges against plaintiff were  
17 baseless. (Id. at 10-12). Plaintiff alleges defendant Cowan "willfully lied" that plaintiff was guilty  
18 of workers compensation fraud; defendant Romero perjured himself while testifying that the  
19 surveillance video of the November 7, 2002 altercation between plaintiff and Ms. Frazier was  
20 not tampered with; defendant Turner knew there was no probable cause for plaintiff's arrest  
21 and, nevertheless, applied for and obtained a warrant for plaintiff's arrest; defendant Loewen  
22 hid evidence that the surveillance video had been tampered with; and all defendants improperly  
23 used criminal court proceedings as a method of defeating plaintiff's pending termination case  
24 against the MTA and intimidated plaintiff for the 17 months that the criminal charges were  
25 pending against him. (Id. at 11-12).

26 Plaintiff brings a claim for malicious prosecution against defendants MTA, Cowan and  
27 Romero, alleging that they had knowledge of the two rulings establishing that plaintiff was not  
28 the initial aggressor in the November 7, 2002 altercation with Ms. Frazier before they filed a

1 criminal case against plaintiff, and that they were aware that there was no probable cause for  
 2 the criminal charges. (First Amended Complaint at 9-10). Plaintiff also brings a claim for  
 3 intentional infliction of emotional distress against all defendants. (Id. at 12).

## 4 5 DISCUSSION

### 6 I. PLAINTIFF'S CLAIMS AGAINST THE MTA, DEPARTMENT OF INSURANCE AND 7 THE DISTRICT ATTORNEY'S OFFICE MUST BE DISMISSED

8 "Municipalities and other local government units . . . [are] among those persons to whom  
 9 § 1983 applies." Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978). A  
 10 local government entity such as the MTA, Department of Insurance or the District Attorney's  
 11 Office, however, "may not be sued under § 1983 for an injury inflicted solely by its employees  
 12 or agents. Instead, it is when execution of a government's policy or custom, whether made by  
 13 its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,  
 14 inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436  
 15 U.S. at 694. Thus, the MTA, Department of Insurance, and the District Attorney's Office may  
 16 not be held liable for the acts of their employees unless "the action that is alleged to be  
 17 unconstitutional implements or executes a policy statement, ordinance, regulation, or decision  
 18 officially adopted or promulgated by that body's officers," or unless the alleged constitutional  
 19 deprivation was "visited pursuant to a governmental 'custom' even though such a custom has  
 20 not received formal approval through the decision-making channels." Id. at 690-91; see also  
 21 Redman v. County of San Diego, 942 F.2d 1435, 1443-44 (9th Cir. 1991).

22 Here, plaintiff seeks to hold the MTA, Department of Insurance, and the District  
 23 Attorney's Office liable for infringing on his civil rights based on their participation in an alleged  
 24 conspiracy to bring false criminal charges against plaintiff in retaliation for plaintiff's inadvertent  
 25 exposure of the MTA's illegal employment practices. While plaintiff alleges that the individual  
 26 defendants were all acting within the scope of their employment with the MTA, the Department  
 27 of Insurance, and District Attorney's Office, respectively, under Monell, that is not enough. See  
 28 Monell, 436 U.S. at 694. Monell requires that the alleged unconstitutional act resulted from the

1 implementation or execution of an official policy, ordinance, regulation or decision, or a  
 2 governmental custom. Plaintiff has failed to identify any specific policy, ordinance, regulation,  
 3 custom, or officially adopted or promulgated decision, the execution of which allegedly caused  
 4 him harm. Accordingly, the allegations of the First Amended Complaint are insufficient to state  
 5 a claim upon which relief can be granted against the MTA, the Department of Insurance, and  
 6 District Attorney's Office. Thus, plaintiff's claims against the MTA, the Department of Insurance  
 7 and District Attorney's Office must be dismissed.<sup>1</sup>

## 8 **II. PLAINTIFF FAILS TO STATE A MALICIOUS PROSECUTION CLAIM**

9 Malicious prosecution with the intent to deprive a person of equal protection of the law  
 10 or otherwise to subject a person to a denial of constitutional rights is cognizable under Section  
 11 1983. Poppell v. City of San Diego, 149 F.3d 951, 961 (9th Cir. 1998); see Awabdy v. City of  
 12 Adelanto, 368 F.3d 1062, 1069 (9th Cir. 2004). However, malicious prosecution claims under  
 13 Section 1983 operate on the presumption that the prosecutor exercised independent judgment  
 14 regarding probable cause. See Newman v. County of Orange, 457 F.3d 991, 993-96 (9th Cir.  
 15 2006). A malicious prosecution claim requires the plaintiff prove that the defendant prosecuted  
 16 him or her with malice and without probable cause, and that the defendant did so for the  
 17 purpose of denying the plaintiff equal protection or another specific constitutional  
 18 right. See Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc); see also Poppell,  
 19 149 F.3d at 961.

20 Here, plaintiff alleges a malicious prosecution claim against defendants MTA, Cowan,  
 21 and Romero. With regard to Cowan, plaintiff alleges that Cowan determined that video footage  
 22 of the November 7, 2002 altercation evinced plaintiff acted improperly and was, therefore, not  
 23 entitled to benefits. (First Amended Complaint at 7). Plaintiff also alleges Cowan "willfully lied"

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 25 <sup>1</sup> In his third claim for relief, plaintiff alleges a claim for "Public Entity Liability Acts or  
 26 Omissions of Employees" against defendants Cowan and Romero. (First Amended Complaint at  
 27 12). In this claim, plaintiff argues that a public entity, here, presumably the MTA, is "liable for injury  
 28 proximately caused by an act or omission of the public entity's employee within the scope of his or  
 her employment." (*Id.*). As discussed above, however, under Section 1983, a local government unit  
 may not be sued for an injury inflicted solely by its employees or agents. See Monell, 436 U.S. at  
 694. Accordingly, plaintiff allegations fail to state a claim against the MTA.

1 that plaintiff was guilty of workers compensation fraud. (First Amended Complaint at 10, 13).  
2 With regard to defendant Romero, plaintiff alleges he "willfully committed perjury" when he  
3 testified that the video footage of the November 7, 2002 altercation was not tampered with. (Id.  
4 at 11, 13). These allegations, however, are insufficient to allege a malicious prosecution claim.  
5 Plaintiff does not allege facts that support a claim that any of the defendants initiated the  
6 criminal prosecution with the intent of depriving plaintiff of a constitutional right. See  
7 Blankenhorn v. City of Orange, 485 F.3d 463, 482 (9th Cir. 2007).

### 8 **III. PLAINTIFF FAILS TO STATE A CLAIM FOR CONSPIRACY**

9 "To state a claim for a conspiracy to violate one's constitutional rights under section  
10 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy."  
11 Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989); see Olsen v. Idaho State Bd. of  
12 Medicine, 363 F.3d 916, 929 (9th Cir.2004). Conclusory allegations of conspiracy are not  
13 enough to support a Section 1983 conspiracy claim. Burns, 883 F.2d at 821; see Harris v.  
14 Roderick, 126 F.3d 1189, 1195 (9th Cir.1997) ("In order to survive a motion to dismiss, plaintiffs  
15 alleging a conspiracy to deprive them of their constitutional rights must 'include in their  
16 complaint nonconclusory allegations containing evidence of unlawful intent or face  
17 dismissal...."). A plaintiff can meet this standard by alleging which defendants conspired, how  
18 they conspired, and how the conspiracy led to a deprivation of constitutional rights. Harris, 126  
19 F.3d at 1195 (9th Cir. 1997).

20 Here, plaintiff has not alleged facts sufficient to meet the heightened pleading standard.  
21 While plaintiff alleges that defendants actions were "designed to embarrass, hinder and  
22 damage" plaintiff, that he has suffered "harm to his reputation, humiliation, embarrassment,  
23 mental anguish and distress" and incurred "attorney fees and lost wages" as a result of the  
24 conspiracy, plaintiff fails to allege specific facts about how defendants conspired and how the  
25 conspiracy led to the deprivation of a constitutional right. Because plaintiff does not allege  
26 specific facts to support a claim of conspiracy, plaintiff's conspiracy claim must be dismissed.

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1 **IV. PLAINTIFF FAILS TO STATE A SECTION 1983 CLAIM AGAINST PAGENKOPP,**  
 2 **SIERRA AND AUBREY**

3 A person "subjects" another to the deprivation of a constitutional right within the meaning  
 4 of Section 1983 if he or she "does an affirmative act, participates in another's affirmative acts,  
 5 or omits to perform an act which he [or she] is legally required to do" that causes the  
 6 complained-of deprivation. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978); see also Taylor  
 7 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (Section 1983 liability requires personal participation  
 8 in deprivation). Here, plaintiff alleges claims for Abuse of Process, Intentional Infliction of  
 9 Emotional Distress and Conspiracy against Pagenkopp, Sierra and Aubrey, who were all  
 10 employees of the Department of Insurance. Plaintiff, however, does not allege that Pagenkopp,  
 11 Sierra or Aubrey participated in, or omitted to perform an act which he or she was required to  
 12 do that resulted in any harm to plaintiff. Moreover, individual liability cannot be premised on  
 13 respondeat superior. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.2002) ("In order for a  
 14 person acting under color of state law to be liable under section 1983 there must be a showing  
 15 of personal participation in the alleged rights deprivation: there is no respondeat superior liability  
 16 under section 1983."). Plaintiff has, therefore, failed to state a claim against Pagenkopp, Sierra  
 17 and Aubrey under Section 1983.

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19 Because the First Amended Complaint fails to state a claim against any defendant, the  
 20 First Amended Complaint, therefore, is **DISMISSED WITH LEAVE TO AMEND**.

21 The Court will, however, afford plaintiff one more opportunity to cure the deficiencies of  
 22 the complaint by amendment. See Noll, 809 F.2d at 1448. If plaintiff desires to pursue this  
 23 action, plaintiff is **ORDERED** to file a Second Amended Complaint within thirty (30) days of the  
 24 date of this Order, remedying the deficiencies discussed above.<sup>2</sup> If plaintiff chooses to file a

25 \_\_\_\_\_  
 26 <sup>2</sup> The Court also notes that plaintiff's claims against Turner and Loewen may be barred by  
 27 prosecutorial immunity. Parties to section 1983 suits are generally entitled to immunities that existed  
 28 at common law. Imbler v. Pachtman, 424 U.S. 409, 417-18 (1976). State actors are granted  
 absolute immunity for those functions that were critical to the judicial phase of the criminal process.  
Genzler v. Longanbach, 410 F.3d 630, 636-68 (9th Cir. 2005). However, an action could still be

1 Second Amended Complaint, it should bear the docket number assigned in this case; be  
 2 labeled "Second Amended Complaint"; and be complete in and of itself without reference to the  
 3 original complaint or any other pleading, attachment or document. The Clerk is directed to  
 4 provide plaintiff with a blank Central District civil rights complaint form, which plaintiff will need  
 5 to completely fill out and resubmit.

6 **Plaintiff is admonished that, if he fails to timely file a Second Amended Complaint,**  
 7 **the Court will recommend that the action be dismissed on the grounds set forth above**  
 8 **and for failure to diligently prosecute.**

9 DATED: January 5, 2009

10 \_\_\_\_\_ /s/  
 11 JENNIFER T. LUM  
 12 UNITED STATES MAGISTRATE JUDGE  
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 25 brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute  
 26 immunity does not extend. See Buckley v. Fitzsimmons, 509 U.S. 259, 274-276 (1993) (no absolute  
 27 immunity when prosecutor acts in administrative capacity); Burns v. Reed, 500 U.S. 478, 492-495  
 28 (1991) (absolute immunity does not attach when a prosecutor offers legal advice to the police  
 regarding interrogation practices); see also Hartman v. Moore, 547 U.S. 250, 261-62 (U.S. 2006). At  
 this early stage in the pleadings, it is unclear whether plaintiff's claims against Turner and Loewen  
 are barred by prosecutorial immunity.